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# In the Supreme Court of the United States

OCTOBER TERM, 1978

MONTANA CONTRACTORS' ASSOCIATION, ET AL.,
APPELLANTS

*v.*

JUANITA KREPS, SECRETARY OF COMMERCE
OF THE UNITED STATES, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA*

## MOTION OF THE FEDERAL APPELLEE TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Commerce, moves that this appeal be dismissed or, in the alternative, that the judgment of the district court be affirmed to the extent that it denies appellants the relief they seek.

### OPINION BELOW

The opinion of the district court (J.S. App. 1a-10a) is reported at 460 F. Supp. 1174.

## JURISDICTION

The final judgment of the district court was entered on January 10, 1979 (J.S. App. 13a). A notice of appeal was filed by appellants on February 9, 1979 (J.S. App. 61a). The jurisdictional statement was filed on April 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

## STATUTES INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 117, 42 U.S.C. 6705(f)(2), is reprinted at J.S. 3-4.

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[1]The government also filed a notice of direct appeal to this Court on February 9, 1979. However, the Solicitor General subsequently determined not to appeal the district court's order, and the Secretary's appeal has not been docketed.



## QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of this appeal.

2. Whether the district court erred in denying appellants' motion to amend their complaint to seek damages from federal officials for adhering to a statute subsequently held unconstitutional.

3. Whether appellants, who did not seek damages in the district court, may present that claim for the first time on appeal to this Court.

## STATEMENT

1. In 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999, which directed the Secretary of Commerce to disperse funds through the Economic Development Administration to provide for various public works projects to alleviate national unemployment. In May 1977, Congress amended the 1976 Act by passing the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116. The new law, in addition to making $6 billion available for the period ending December 31, 1978, added a "minority business enterprise" (MBE) requirement (Section 103(f)(2), 42 U.S.C. 6705(f)(2)), which provides that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under this Act * * * unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

Regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)) permit waiver of the MBE requirement when "the Assistant Secretary makes a determination that the 10 percent set-aside cannot be filled by

minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." Under Economic Development Administration procedures, only a grantee may obtain a waiver. *EDA Minority Business Enterprise Technical Bulletin,* October 11, 1977, p. 5. Regional Directors of the EDA were delegated authority to grant such waivers. *Economic Development Administration Directive Systems,* Bulletin No. 32-77, effective September 1, 1977.

2. This appeal arises from two actions filed by appellants in the United States District Court for the District of Montana. The first (referred to in the Jurisdictional Statement as *Montana II*), filed on December 6, 1977, sought declaratory and injunctive relief against the Secretary of Commerce, the Montana State District Officer of the Montana Economic Development Administration, the City of White Sulpur Springs, Montana, and officials of that city (J.S. App. 22a-39a). Specifically, the complaint sought a declaratory judgment that Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), is unconstitutional. Appellants also sought to enjoin enforcement of the provision with respect to a water systems improvement project funded by the Secretary for the City of White Sulphur Springs. In addition, the complaint sought damages against the "Local Defendants" in the amount of $33,626.17 (J.S. App. 39a).

The complaint alleged that appellant Lloyd C. Lockrem, Inc. ("Lockrem") had submitted the low bid on the project but that the contract was awarded to the next lowest bidder solely because Lockrem had not met the MBE requirement of assuring that 10% of the amount of the grant would be expended for minority



business enterprises (J.S. App. 25a-26a). The complaint also alleged that Lockrem requested the city of White Sulphur Springs, the grantee, to obtain a waiver (J.S. App. 29a). The damages were intended to compensate Lockrem for the profit it allegedly lost when the city rejected Lockrem's bid in favor of another bid that met the requirements of the Act.

At a pre-trial conference on August 11, 1978, the district court indicated that it would not award damages against the local defendants (J.S. App. 21a). Lockrem then moved on August 24, 1978, to amend its complaint to seek damages against Reginal Gant, a Civil Rights Specialist in the Denver Regional Office of the Economic Development Administration, on the ground that he had "summarily denied Lockrem's request for a waiver of the MBE requirement both directly and indirectly through city officials, and in doing so, acted arbitrarily, unreasonably, and unjustifiably * * *" (J.S. App. 16a). On October 4, 1978, the district court denied the motion to amend the complaint on the ground that the claim stated in the proposed amendment would be subject to a motion to dismiss under *Butz* v. *Economou,* 438 U.S. 478 (1978) (J.S. App. 14a).

The second case (referred to in the Jurisdictional Statement as *Montana I*), (filed on December 14, 1977, and consolidated with *Montana II*, was based principally on a public works project that the City of Kalispell, Montana, had advertised for bids. The complaint sought declaratory and injunctive relief against enforcement of Section 103(f)(2) because of its alleged unconstitutionality and also sought "such other additional relief as is just and equitable" (J.S. App. 59a-60a).

The second complaint claimed that appellants depend upon contracts with municipal and state governments for a substantial portion of their business (J.S. App. 51a-52a), that the City of Kalispell and other state and local governments are potential grantees under the Public Works Employment Act (*ibid.*), that "the Defendant Secretary has required and is continuing to require assurances from all grantees that at least ten (10%) percent of the money granted will go to minority enterprises" (*id.* at 54a), that "enforcement of the Act and the regulations and promulgations thereunder will work an unusual and irreparable hardship and burden" upon appellants and "will continue to deprive [appellants of] * * * economic benefits" (*id.* at 56a), and that appellants "have no adequate remedy at law" (*id.* at 57a). The complaint then alleged that immediate injunctive relief was necessary with regard to the Kalispell project because contracts were about to be awarded (*id.* at 57a).

The district court issued its opinion in the consolidated cases on November 24, 1978. The court held that Section 103(f)(2) was unconstitutional because it did not conform to the standards announced in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Although appellants had sought an injunction against enforcement of the provision with respect to several projects, the court only enjoined enforcement with respect to a public works project by the City of Belt, Montana, the sole remaining project for which the contract had not been let (J.S. App. 11a-12a).

**ARGUMENT**

1. This Court lacks jurisdiction of appellants' appeal. Appellants obviously do not challenge the district



court's holding that the MBE requirement of the Public Works Employment Act of 1977 is unconstitutional. Since they prevailed on that issue, they could not appeal it. *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934). Rather, they seek (1) review of the district court's order denying a motion to amend the complaint in *Montana II* to assert a claim for damages and (2) a holding from this Court that they are entitled to damages from both the federal and local defendants in *Montana I*, a case in which they never asked the district court for damages. These are not issues that may be brought to this Court by direct appeal.

The statute (28 U.S.C. 1252) under which this Court's appellate jurisdiction is invoked provides for direct appeals from "an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." Section 1252 is applicable only where "the basis of the decision below in fact was that the Act of Congress was unconstitutional * * *." *United States* v. *Raines*, 362 U.S. 17, 20 (1960). In *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975), the Court explained that the purpose of the statute, which "unambiguously mandated an exception to [the] policy" of minimizing the Court's mandatory docket[2], is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality."

Although the statute allows "any party" to appeal, this Court's decisions interpreting Section 1252 make

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[2]See *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974).

clear that it is designed to provide for expeditious review of holdings against the constitutionality of congressional acts,[3] and appeals under Section 1252 accordingly have been limited to parties seeking review of such holdings. Hence, this Court has declined to review an order upholding an Act of Congress against constitutional challenge, *Norton* v. *Mathews*, 427 U.S. 524, 529 n.3 (1976), a holding that executive officers misconstrued an Act of Congress and applied it in an unconstitutional manner, *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 563-564 (1972), and a holding construing an Act of Congress so as to avoid unconstitutionality. *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 251 (1938). Similarly, this appeal does not seek review of a "holding" where "the basis of the decision below in fact was that the Act of Congress was unconstitutional * * *." *United States* v. *Raines*, *supra*, 362 U.S. at 20. The issues appellants seek to present to this Court are wholly peripheral to that question.[4]

It is established, of course, that if a proper appeal is taken to this Court under Section 1252, the Court then has jurisdiction of the "whole case" and may decide any issue in the case that is ripe for appellate review. *Fusari* v. *Steinberg*, 419 U.S. 379, 388 n.13 (1975);

[3]See also C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* §4037 (1978).

[4]Appellants are incorrect in their assertion (J.S. 3 n.1) that plaintiffs' appeal in *Associated General Contractors of California* v. *Secretary of Commerce*, No. 77-1078 (July 3, 1978), gave this Court jurisdiction for its remand in that case. The Court's jurisdiction was based upon the Secretary's appeal (No. 77-1271) from a judgment that the statute was unconstitutional.



*United States* v. *Raines*, *supra*, 362 U.S. at 27 n.7. Thus, if this appeal were pendent to one challenging the holding that the MBE provision is unconstitutional, it would properly be before the Court. But since the Secretary has not docketed an appeal of the district court's constitutional holding, it cannot provide a predicate for appellant's direct appeal under Section 1252.

This appeal should therefore be dismissed for lack of jurisdiction.[5] In the event that the Court disagrees with this conclusion, then the judgment of the district court should be affirmed because, as we demonstrate below, appellants' claims are plainly insubstantial.

2. As to the federal parties in *Montana II*, appellants argue (J.S. 11-12) that the district court erred in denying their motion to amend the complaint to claim damages against Reginal Gant, a Civil Rights Specialist, for failure to grant a waiver of the MBE requirement for the White Sulphur Springs project. A district court has broad discretion to refuse to allow a party to amend its pleading after a responsive pleading has been served. See Fed. R. Civ. P. 15(a); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971). The court properly denied the motion to amend in this case on the ground that appellants had not stated a claim for which monetary relief could be granted. As this Court held in *Butz* v. *Economou*,

[5]Appellants' appeal to this Court is understandable, since it was taken at a time when it appeared that the Secretary would be appealing the district court's holding of unconstitutionality under Section 1252. In these circumstances, the Court may deem it appropriate to vacate the judgment of the district court and to remand for the entry of a new judgment so that appellants may appeal to the United States Court of Appeals for the Ninth Circuit.

438 U.S. 478 (1978), a federal executive official may be held personally liable in damages only if he "knows or should know he is acting outside the law" 438 U.S. at 507-508.

Appellants' motion to amend did not allege that Gant had authority to grant a waiver of the MBE requirement, and in fact he did not.[6] Thus, a claim based on his failure to grant a waiver cannot state "a compensable claim for relief under the * * * Constitution" (*Butz* v. *Economou, supra,* 438 U.S. at 507).

Moreover, if appellants' claim is construed as one seeking damages for enforcement of the MBE requirement, it must also fail. There is no allegation that Gant, or any other defendant, was acting except in accordance with Section 103(f)(2).[7] Gant had no discretion to ignore the statutory requirement, and a federal offical may not be held liable in damages for exercising his duty to enforce an Act of Congress simply because that Act is subsequently held unconstitutional. See *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); cf. *Procunier* v. *Navarette,* 434 U.S. 555, 564-565 (1978). Such liability would attach only if the unconstitutionality is " 'clearly established.' " *Butz* v. *Economou, supra,* 438 U.S. at 498. That certainly

[6]Regional Directors of the Economic Development Administration may grant waivers. See page 4, *supra.* Gant is a subordinate of the Denver Regional Director.

[7]The motion to amend the complaint (J.S. App. 15a-16a) alleged that Gant was instrumental in denying Lockrem a waiver of the 10% minority requirement. If, in fact, Lockrem was summarily denied a waiver, the denial was required by the Act and its implementing regulations. The complaint demonstrates that the conditions for waiver (unavailability of qualified MBE's) were not present because the bidder who eventually got the contract met the requirements of the Act (J.S. App. 26a).



cannot be said of the statute here, since 11 district courts and three courts of appeals have upheld the constitutionality of the MBE provision.[8]

In sum, appellant's proposed amended complaint failed to allege that any federal official "discharge[d his] duties in a way that [was] known to [him] to violate the United States Constitution or in a manner that [he] should [have] know[n] transgresse[d] a clearly established constitutional rule." *Butz* v. *Economou, supra,* 438 U.S. at 507.[9]

3. Appellants also contend (J.S. 12) that this Court should hold that they are entitled to damges in *Montana I.* But no claim for damages was made in that case, and the complaint does not present any facts alleging specific, quantifiable injury upon which to base an award of damages. See pages 5-6, *supra.* Appellants' theory seems to be that simply because the district court declared the MBE provision unconstitutional, both federal and local officials should be required to pay damages. But they have offered no reason why

[8]See, *e.g., Constructors Association of Western Pennsylvania* v. *Kreps,* 573 F. 2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration,* 580 F. 2d 213 (6th Cir. 1978); *Fullilove* v. *Kreps,* 584 F. 2d 600 (2d Cir. 1978), cert. granted, No. 78-1007 (May 21, 1979). See also the cases cited in Memorandum for the United States in *Fullilove* v. *Kreps,* No. 78-1007, pages 8-9 n.3. In addition to the court below, two other district courts have held the statute unconstitutional. *Wright Farms Construction, Inc.* v. *Kreps,* 444 F. Supp. 1023 (D. Vt. 1977); *Associated General Constractors of California* v. *Secretary of Commerce,* 459 F. Supp. 766 (C.D. Cal. 1978), appeal docketed, No. 78-1107 (Jan. 15, 1979).

[9]Although this motion is made only on behalf of the federal appellees, the same principles would apply to appellants' damages claims against the local appellees. See *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975).

this Court should make an exception to the general rule that the claims of a party may not be enlarged on appeal. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 110-121 (1976). Furthermore, for the reasons stated above, federal officials would be immune from damage liability under *Butz* v. *Economou*, *supra*.[10]

## CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be affirmed to the extent that it denies damages to appellants.[11]

Respectfully submitted.

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MAY 1979

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[10]Appellants' reliance on *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), is misplaced. The relief held appropriate in that case was not damages against a federal official for alleged violation of the constitution, but back pay against a private employer for violation of a statute that authorized such relief. As this Court explained, "one of the central purposes of Title VII [of the Civil Rights Act of 1964] is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' [Citation omitted.] To effectuate this 'make whole' objective, Congress in Section 706(g) vested broad *equitable* discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include * * * *back pay* * * *.'" *Id.* at 763 (emphasis added).

[11]See note 5, *supra*.